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THE REQUISITES OF A VALID TENDER.

A TENDER in the law has been defined as an offer, made in pursuance of some contract or obligation, to deliver something under such circumstances as to require no further act from the party making it to complete the transfer. The contract or obligation mentioned may be either express or implied, and may, according to the terms of the same and the circumstances surrounding the particular transaction, render necessary the proffer either of a sum of money or of specific articles. An act which would amount to a tender in the proffer of money may not always be effective as such in the attempted transfer of a chattel, yet there are certain general principles, applicable alike to tenders of money and of goods, which have met with the approval of the courts through many years and have become so well settled as to be frequently referred to as text-book law. In considering these, the distinction between executed contracts and those of an executory nature must be kept prominently before the mind, since the requisites of a tender are not always the same in both instances. It should be also remembered that tender of a debt may be made only in cases where the demand is of a pecuniary nature and is reduced or reducible to certainty; and in no instance where the claim is for *unliquidated* damages. The effect of a tender, when made, is not to *bar* or

extinguish the debt, but merely to prevent any claim for subsequent damages or interest, and to entitle the defendant to judgment for his costs: Chit. Cont., chap. v., sect. 8.

Among the general *requisites* of a tender may be stated first, the rule that "an *actual* tender, unless rendered impossible or impracticable by the fault or negligence of the creditor, must be made in all cases where a debt is due or a contract *executed*, and the party to whom it is payable is entitled to it without the performance of anything on his part, and the object of the debtor is to discharge himself from an action for it." And the same rule prevails where one is bound to deliver goods, an actual offer must in all cases be made; for, a mere *readiness and willingness* to perform an obligation of this nature will not be sufficient in the law: *Haldane* v. *Johnson*, 8 Exch. 689; *Cranley* v. *Hillary*, 2 M. & S. 120; *Williams* v. *Bentley*, 3 Casey 294; *Pennsylvania Co.* v. *Dover*, 14 P. F. Smith 267; *Littell* v. *Nichols*, Hard. 66; *Eastman* v. *Rapids*, 21 Ia. 590; *Cramp* v. *Simon*, 34 Ala. 126; *Steele* v. *Beggs*, 22 Ill. 643; *Sheredine* v. *Gaul*, 2 Dall. 190. But where a contract is to deliver goods "on request," the vendee need only aver a request and a *readiness* to pay the price, without showing that it was actually tendered: *Rawson* v. *Johnson*, 1 East 203. And even where a tender is necessary, it is sufficient for the debtor to show that he has made as ample a tender as was possible under the circumstances: *White* v. *Mann*, 26 Me. 361. Likewise, should an offer to pay money or an attempt to deliver goods be prevented or rendered useless by the negligence or misconduct of the other party the failure to make a tender will be excused. As where the plaintiff fails to comply with some of the conditions of the contract, such as not being at the place fixed upon at the time the contract is to be performed (9 Bac. Abr. 331), or a creditor refuses to receive the money (*Dorsey* v. *Barbee*, 6 Litt. 204), or designedly evades his debtor and brings his action so soon that tender could not be made before the commencement of the same: *Gilmore* v. *Holt*, 4 Pick. 259. And again, in the case of an *executory* contract, where the acts to be done by the contracting parties are mutual and to be performed at the same time, it is only necessary that the plaintiff should aver that he has been *ready and willing* to perform his part, to enable him to bring his action: 1 Chit. Plead. 326.

Secondly, every tender made in pursuance of an express contract must answer the requirements of the same by conformity

thereto, in all the particulars of time, place, manner and the character of the thing to be transferred. With regard to the *time* of tender, statutes have been passed in many of the states, providing that in actions for the recovery of money, founded upon contract, the debtor shall have the privilege of making a tender at any time before trial in court, of the amount he admits to be due, together with all costs accrued up to date of such tender; and compelling the plaintiff, in case he do not recover more than the sum thus tendered, to pay all costs subsequently incurred. But by the common law, if the defendant would avoid payment of costs and liability to damages, it was requisite that tender be made in the very time agreed upon, for a tender after the time was only allowed to go in mitigation of the damages—and in no case could a tender be effective if made after suit brought; although in a court of equity, a tender with costs might be made after the bill had been filed: 21 James I., ch. 16, sect. 5; *Tillon* v. *Britton*, 4 Halst. 120; *Fishburne* v. *Sanders*, 1 Nott & McC. 242; *Hubbard* v. *The Bank*, 8 Cowen 88; *Ripley* v. *Wardell*, Caines 175. The reason for the strictness of the rule that tender of a debt could not be made after the same had become due, arose mainly from the fact that the averment of "*tout temps prist*" was material in every plea of tender, and the debtor, not having paid the claim upon the day of its falling due, could not aver that he had been *always ready:* 9 Bac. Abr. 325; *Huston* v. *Noble*, 4 J. J. Marsh. 130; *Day* v. *Lafferty*, 4 Ark. 450.

Where an obligation is to be performed by the delivery of chattels upon a certain day, a valid tender of the same can be made only upon that day; and the same rule prevails where the promise is in the alternative—that is, to pay a sum of money *or* deliver certain goods. In both cases, if the day of performance be allowed to pass without tender being made, the right of election ceases, and the agreement becomes immediately absolute for the payment of the amount of the consideration in money: *Green* v. *Annon*, Halst. 461; Chit. on Cont. 304; *Roberts* v. *Beatty*, 2 P. & W. (Pa.) 68; *Church* v. *Fetterow*, Id. 301. And where the condition of a bond is that the obligor shall, at a day and place certain, "pay 20*l.* or deliver ten kine at the *then* choice of the obligee," a tender must be made of both the money and the kine: *Forkley's Case*, 1 Leon. 68. Should the contract be for the payment of money or the delivery of goods at a place certain *upon or before* a day mentioned, the lawful period for a tender would be the uttermost convenient

time of the last day, which is interpreted to mean an hour when there is time enough left before sunset to count the money or examine the goods. For it is reasonable that there should be fixed upon some particular time at which both parties may be at the place designated; and since the debtor cannot be compelled to be there to make his tender before this last hour of the period mentioned, it has been adjudged proper that the other party should not be obliged to attend for the receiving of the money before that time. But as this rule is established for the convenience of the party to whom the payment or delivery is to be made, a tender at any other time within the period limited will be good, should the parties happen to meet at the place designated and an offer be made: *Allen* v. *Andrews*, Cro. Eliz. 73; Plowd. 172; Co. Litt. 211; *Tinkler* v. *Prentice*, 4 Taunt. 554.

The *place* specified for performance of an obligation should likewise be observed in making a tender, unless the creditor choose to accept payment elsewhere: Co. Litt. 210. But where no place is designated, the circumstances connected with each case must be regarded and a reasonable rule adopted. Thus where one is bound to pay money on a day certain, he must seek the creditor wherever he may be and make tender to him in person, unless he should be out of the state at the time the debt becomes due, in which event no tender will be required: Co. Litt. 210 b; *Littell* v. *Nicholl's Adm'r*, Hard. 66; *Alshouse* v. *Ramsay*, 6 Whart. 331. In *Smith* v. *Smith*, 25 Wend. 405, it was decided that where, in a contract for the sale of lands, no place is fixed for the payment of the purchase-money, a tender of the money and demand of a deed at the *residence* of the vendor on the day appointed for execution of the contract, is a sufficient compliance on the part of the purchaser to give him a right of action against the vendor; and if the latter at the time of such tender and demand is absent from home, a personal tender will not be required. The place for a tender of *chattels* where none has been fixed upon, is ordinarily the residence of the person to whom delivery is to be made: *Grant* v. *Groshorn*, Hard. 85; *Jacoby* v. *Schwartzwelder*, 1 Bibb 430; *Galloway* v. *Smith*, Litt. Sel. Cas. 33. But circumstances may change this, as where ponderous articles are to be delivered and no place has been specified; in such case it is incumbent upon the party whose duty it is to make the tender, to seek the other person before the day agreed upon and learn of him where he will have the articles

delivered, and then, if a reasonable place be appointed, offer them there: 9 Bac. Abr. 320; *Barnes* v. *Graham*, 4 Cowen 452.

With respect to the *parties* to a tender, the general rule is, that it can only be made by the debtor himself or by his authorized agent (*McDougal* v. *Dougherty*, 11 Ga. 570; *Crop* v. *Hambleton*, Cro. Eliz. 48; *Johnson* v. *Smock*, 1 N. J. L. 106), to the creditor in person or to one to whom he has delegated authority for the purpose: *Hornby* v. *Cramer*, 12 How. (N. Y.) Pr. 490; *Billot* v. *Robinson*, 13 La. Ann. 529; *Hoyt* v. *Rymes*, 11 Me. 475; *McIniffe* v. *Wheelock*, 1 Gray 600. Necessity and expediency, however, create frequent exceptions to this rule, and validity is sometimes given to a tender made by one who is an entire stranger to a transaction. Thus it is stated by Lord COKE (1 Inst. 206 b) that any person may make a tender on behalf of an idiot, for the law, on account of the absolute inability of such a person to act for himself, allows this to be done out of charity. And in *Brown* v. *Dysinger*, 1 Rawle 408, a tender of money was permitted to be made by an uncle on behalf of an infant whose father was dead, but whose mother was living, although the uncle had not been appointed guardian. A trustee or his personal representatives after his death are the persons to whom tender should be made by one indebted to a *cestui que trust*: *Chahoon et al.* v. *Hollenback*, 16 S. & R. 425; and a tender of a deed to one of two joint purchasers and a refusal by him is sufficient; no tender need be made to the other also: *Carman* v. *Pultz*, 21 N. Y. 547; *Dawson* v. *Ewing*, 16 S. & R. 371.

In making a tender of money, the *full* and *exact* amount due should be offered; for the tender of a less sum would clearly be valueless: *Patnote* v. *Sanders*, 41 Vt. 66; *Helphrey* v. *Railroad Co.*, 29 Ia. 480; *Baker* v. *Gasque*, 3 Strob. (S. C.) 25; and where a larger sum is offered, the creditor is not bound to receive it, should the debtor demand change (6 Taunt. 336), although a tender of more than is due is perfectly good for the amount payable, should not change be required for the balance: 9 Bac. Abr. 317; *Patterson* v. *Coxe*, 25 Ind. 261. Even where change is asked, should the creditor object to receiving the money offered on the ground that he is entitled to more than the amount admitted to be due, and not because he does not have the change at hand, the tender would be good: *Cadman* v. *Lubbock*, 5 D. & Ryl. 289.

When, however, a large sum is tendered, it is not necessary that

the debtor pay or keep good the whole amount first offered; for, although a tender of money in payment of a debt is evidence of the amount due and is supposed to be an admission by the debtor that the entire sum tendered is due and payable, yet it is not *conclusive* evidence: *Abel* v. *Opel*, 24 Ind. 250. Though in a late case in Pennsylvania, in which tender was made under Act of March 12th 1867 (Purd. Dig. 1395), after suit brought, and the amount supposed by defendant to be due the plaintiff was paid into court, it was decided, that defendant, having by the act of tender admitted the amount thereupon put into the hands of the court to be due, this full amount must be paid over to plaintiff, notwithstanding the fact that the award of the arbitrators in the case had shown that a much less sum was really owing to him by defendant: *Berkheimer* v. *Geise et al.*, 82 Penna. St. 64. Should a tender be made after the day of payment, it must include interest: *Hamar* v. *Dimmick*, 14 Ind. 105.

To be sufficient, a tender must be so complete and perfect as to vest the absolute property in the person to whom it is made: *Schrader* v. *Wolfin*, 21 Ind. 238; hence an offer of payment must be unconditional and without reserve, for any attempt to attach a condition to a proposed payment or delivery will invalidate it as a tender. Thus, an offer of payment accompanied with a demand of a receipt in full, or on condition of the sum tendered being received as the whole balance due, is bad: *Thayer* v. *Brackett*, 12 Mass. 450; *Wagenblast* v. *McKean*, 2 Grant 399. Yet a tender will not be affected by there being affixed to it a condition on which the debtor has a right to insist and to which the creditor could not reasonably object: *Wheelock* v. *Tanner*, 39 N. Y. 481. An illustration of this principle is presented in the case of an executory contract, as where one party is to make a deed and the other is to pay to him the purchase-money, an unconditional tender will not be required on the part of the purchaser to enable him to bring suit against the vendor for specific performance and execution of a deed. In all cases of this kind, an offer to pay on condition of performance is sufficient, if performance is refused and the money is brought into court at the time of trial: *Henry* v. *Raiman*, 25 Penna. St. 354. But, as before stated, it is not enough in case of an *executed* contract that the defendant was ready and willing, at the proper time, to pay the money or deliver the goods. There must be an actual attempt at delivery or an actual production and

offer of the money: *Thomas* v. *Evans*, 10 East 101; *Ladd* v. *Patten*, 1 Cranch C. C. 263; *Walker* v. *Brown*, 12 La. Ann. 266; *Bowen* v. *Holley*, 38 Vt. 574; *Bakeman* v. *Pooler*, 15 Wend. 637; which may, however, be dispensed with by the express declarations or some equivalent act of the creditor: *Sands* v. *Lyon*, 18 Cowen 18; *Hazard* v. *Loring*, 10 Cush. 267; *Appleton* v. *Donaldson*, 3 Penna. St. 381; *Strong* v. *Blake*, 46 Barb. 227. But a mere offer to pay, where it does not appear that the party had the money ready, can not be made available as a tender. As was said in *Seawright* v. *Calbraith et al.*, 4 Dall. 303, where the necessity for the production of the money was dispensed with by the creditor having demanded payment in specific kind of coin, "the jury must be satisfied that, although the money was not produced and counted, it was actually in possession of the party making the tender." See also *Fuller* v. *Little*, 7 N. H. 535. Likewise, if a tender is not made in good faith, it cannot be afterward taken advantage of: *Fisk* v. *Holden*, 17 Texas 408. If desirable to the debtor, "he may make tender of the money in bags or purses, without showing or telling the same * * * and then it is the duty of the party that is to receive it to put it out and count it: Co. Litt. 208 *a*; *Conway* v. *Case*, 22 Ill. 127; *Behaley* v. *Hatch*, 1 Miss. 369. And a tender will be valid, as such, though the creditor refuses to remain until the money can be counted: *Raimes* v. *Jones*, 4 Humph. 490. But where a creditor had called upon his debtor to receive payment, and while he was counting the money the debtor told him that his claim was extortionate, it was held that he was justified in leaving the premises; and, though the money was laid out before him, it was no tender: *Harris* v. *Mulock*, 9 How. (N. Y.) Pr. 402. In some instances, the existence of a deposit in bank may, to all intents and purposes, amount to a tender. As, where defendant kept funds in bank to meet a particular demand payable at that bank, but which was not presented for several months after it became due, he prevented interest, the deposit being held equivalent to a tender: *Commonwealth* v. *Crevor*, 3 Binn. 121. Yet the mere having money in bank, sufficient to meet a note, will not support a plea of tender unless the fund was in some way appropriated to such claim: *Myers* v. *Byington*, 34 Ia. 205. And should the money, in a case such as *Commonwealth* v. *Crevor*, *supra*, be, at any time after the maturity of the demand, withdrawn and used, the defendant would become liable for interest from that

date, since even tendered money bears interest if subsequently used: *Miller* v. *Bank*, 5 Whart. 505. This arises from the rule that when a party has made a tender and expressed his readiness to perform his duty, he must from that time forth be always ready to do so. Hence, if after having made a tender, the debtor refuses to pay upon any subsequent demand for the same, he loses the benefit of his tender (*Town* v. *Trow*, 16 Pick. 46; *Rose* v. *Brown*, Kirby 293; *Natz* v. *Lober*, 1 Dav. 304; *Stowe* v. *Russell*, 36 Ill. 18; *Pulsifer* v. *Sheppard*, 36 Id. 513; *Call* v. *Scott*, 4 Cal. 402), unless his subsequent refusal should arise from something objectionable in the action of the plaintiff, as where demand was made at an unseasonable hour, the defendant's refusal was not permitted to avoid the effect of a tender made previously: *Tucker* v. *Buffum*, 16 Pick. 46.

It is further requisite, in order that a defendant may reap any advantage from his tender, that he should plead it, with *tout temps prist* (*Wagenblast* v. *McKean*, *supra*), and upon the further plea of *uncore prist*, bring the money into court: *Sheredine* v. *Gaul*, *supra*; *Miller* v. *Bank*, *supra*; *Mohn* v. *Stoner*, 14 Ia. 115; *Jarboe* v. *McAtee*, 7 B. Mon. 279; *De Wolf* v. *Long*, 7 Ill. 679; *Clark* v. *Mullenix*, 11 Ind. 532; *Brock* v. *Jones*, 16 Texas 461; *Mason* v. *Croom*, 24 Ga. 211; *Livingston* v. *Harrison*, 2 E. D. Smith (N. Y.) 197; *Wing* v. *Hurlburst*, 15 Vt. 607. In courts of equity, however, this doctrine is much modified, and it is not there required that the money be brought into court, but it is regarded as sufficient if the respondent *offers* to bring the money into court and expresses his readiness to comply with the direction of the court in regard to it: *Breitenbach* v. *Turner*, 18 Wis. 140. And it has been decided that the rule that a strict and unconditional tender followed by bringing the money into a court is necessary in order that the tender may be effective, has no application to the tender required before an action for specific performance of a contract for the sale of real estate: *Fall* v. *Hazelrigg*, 45 Ind. 476.

The question as to what is a legal tender medium of exchange has given rise to much dispute, not only in America but among all civilized people. Most contracts are, with us, made payable in "lawful money of the United States," and where liability to pay is incurred and no particular mode of payment is specified, it is understood that it shall be in such lawful money; hence we may inquire what is "money?" Lord COKE has derived the word from

the Latin verb *moneo*, I advise, and says "*moneta dicitur a monendo*, not only because he that hath it is to be warned providently to use it, but also because *nota illa de authore et valore admonet.*" Be this as it may, the word money is now applied to anything used as a convenient medium of exchange, and is a generic term, embracing every description of coin or bank notes recognised by common consent as a representative of value in effecting exchanges of property or payment of debts: *Hopson* v. *Fountain*, 5 Humph. 140. Bank notes, however, have been variously looked upon by jurists, some regarding them as money and others assigning to them a character differing in but slight degree from the ordinary promissory note of an individual. Lord MANSFIELD, in *Miller* v. *Race*, 1 Sm. Lead. Cas. 736, says of them, "They are not goods nor securities nor documents for debts: but are treated as *money*, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; *they are as much money as guineas themselves are*, or any other coin that is used in common payments as money or cash;" and the same principles were recognised by Chief Justice GIBSON in *Bayard* v. *Shunk*, 1 W. & S. 92; see also *Scruggs* v. *Gass*, 8 Yerg. 175; *Young* v. *Adams*, 6 Mass. 182. Nevertheless, an offer to pay bank notes in liquidation of a general indebtedness has never been regarded as a valid tender in the law: 9 Bac. Abr. 318; *Cornell et al.* v. *Green*, 10 S. & R. 14; *Donaldson* v. *Benton*, 4 Dev. & Bat. (N. C.) L. 435; *Jones* v. *Millenix*, 25 Ia. 98. Though where bank notes are offered in payment and no objection is made, at the time, on that account, it is a good tender: 9 Bac. Abr. 319; *Williams* v. *Roor*, 7 Mo. 556; *Seawell* v. *Henry*, 6 Ala. 226; *Noe* v. *Hodges*, 3 Humph. 162; *Brown* v. *Simmons*, 44 N. H. 475; *Snow* v. *Perry*, 9 Pick. 539; and a tender in the notes of a bank, as between the bank itself and its debtors, is equivalent to a tender in specie: *Bank* v. *Balliett*, 8 W. & S. 311. A tender may also be made by the offer of a check upon a bank, if the offer be not objected to on that account and the check calls for enough money: Add. on Cont. 960.

The constitution of the United States has declared that "no state shall make anything but gold and silver coin a tender in payment of debts." The states are, therefore, debarred from impressing by special legislation upon the issues of the various banks or

upon any bills issued by themselves the character of a legal tender medium; and a statute of Tennessee, making bank notes receivable in payment of executions or in redeeming lands sold on execution, was held to be unconstitutional and void, as violative of this provision: *Lowry* v. *McGhee*, 8 Yerg. 242.

From what has been said, it may therefore be concluded that the only thing in which an effective tender of a debt can be made, whether the creditor choose to accept or refuse it, is the current *coin* of the country in which it is offered, or a foreign coin, if made legal tender by act of the legislature; Co. Litt. 207 b: *Wade's Case*, 5 Rep. 114. By Act of Congress of February 21st 1857, the law previously in force making certain foreign coins a legal tender in the United States was repealed; and it was thereby declared that nothing but gold and silver coins of the United States and our treasury notes should thereafter be such: 3 Brightly's Dig. 156, sect. 41. The silver coins of denominations less than one dollar (with the exception of the three cent pieces of the years 1851, 1852, 1853, which by acts of those dates were made a legal tender in sums not exceeding thirty cents) remained, as they had been since the Act of 1853, a legal tender to the amount of five dollars. The silver dollar with the exception of the new trade dollar, which is not a legal tender to any amount, gradually disappeared, it having been found that a profit could be realized by recoining them into the smaller coins. But all the silver coins coined prior to June 1st 1853, except the three cent pieces as above stated, remained a legal tender for their nominal value upon debts of any amount; as did also the *silver dollars* coined subsequent to that date, they having been excepted from the act. Finally, it was declared by the Act of February 12th 1873, that *no silver coins* should be a legal tender for debts exceeding *five dollars*; and a statute of the same date provided that the minor coins, consisting of the nickle five, three and one cent pieces, should be a legal tender at their nominal values for any amount not exceeding twenty-five cents: Rev. Stat. of U. S. 712, sect. 3587. The old copper one cent piece is not and never was a legal tender to any amount whatever. See late reply of the United States Treasurer in answer to inquiries from the Post Office Department.

The Acts of Congress of February 25th 1862 and March 3d 1863, making treasury notes or "greenbacks" "lawful money and a legal tender in payment of all debts public and private * * *

except for duties on imposts and interest on the public debt," were by the Supreme Court of the United States in *Hepburn* v. *Griswold*, 8 Wall. 603, held to be *unconstitutional* in so far as they were claimed to apply to debts contracted before those acts were passed; for it was said, the payments stipulated for by such contracts were either expressly or impliedly intended to be payments in coin, that being at the time of their creation the only legal tender existing, and however Congress in the exercise of its supreme legislative authority might prescribe a rule for future transactions, the power to change existing contracts was nowhere in the constitution conceded to that body; and such a power could not be implied, being in its nature subversive of the very ends of governments, which are created to enforce and not to destroy the private compacts of individuals, so long as they conform to existing laws. But this decision was in the year 1870 overruled by the same court, and it was then declared that the laws of Congress making these notes a legal tender were *constitutional* whether applied to debts contracted before or after their enactment: *Knox* v. *Lee*, 12 Wall. 457. The effect of which ruling is, that where the amount due upon a general indebtedness is once ascertained, the courts cannot recognise any difference between a gold dollar and a legal tender note of that denomination: *Bank* v. *Burton*, 27 Ind. 426. And, since the ultimate authority for the exposition of all Acts of Congress rests in the Supreme Court of the United States, the principle by it thus enunciated has guided the state courts in all their subsequent rulings; it having been universally recognised that the decisions of that high authority are, with regard to the constitutionality of Acts of Congress, obligatory upon, and must be followed by, state tribunals: *Barringer* v. *Fisher*, 45 Miss. 200; *Townsend* v. *Jennison*, 44 Vt. 715; *Bellock* v. *Davis*, 38 Cal. 242; *Smith* v. *Smith*, 1 Thomp. & C. 63; *Smith* v. *Wood*, 37 Texas 616; *Rankin* v. *Demott*, 61 Penna. St. 264. Therefore, in all cases where obligations, whether contracted before or after the passage of the legal tender acts, were made payable in *money* generally and not in any specified kind of money, they may be paid dollar for dollar in legal tender notes: *Savage* v. *United States*, 8 Ct. of Cl. 545; *People* v. *Cook*, 44 Cal. 638; *Higgins* v. *Bear River Co.*, 27 Id. 153. And an offer to pay in "greenbacks" the amount of a judgment rendered in 1858 was held to be a good tender; since, upon a general indebtedness such as this, the judg-

ment plaintiff could not refuse the treasury notes and demand payment in coin: *Bowen* v *Clark*, 46 Ind. 405.

There are, however, many instances in which these notes are not available in the discharge of liabilities, incurred both before and since their creation. It has been decided that the legal tender acts relate merely to the effect of the notes issued thereunder as a tender in payment of debts arising on contract, but do not forbid the recognition in other relations of the difference between coin and currency. While, therefore, a bond which is not made payable in coin may be discharged in legal tender notes, yet in an action for the *conversion* of this bond, it was permitted, in fixing the damages to take into consideration the difference in value between gold and currency, inasmuch as it had been shown that bonds of the company, by which the one converted was issued, were always paid in gold: *Simpkins* v. *Low*, 54 N. Y. 179.

Likewise, as heretofore intimated, where the parties to a contract have themselves stipulated for payment in a specific kind of money, whether such stipulations were entered into before or after the passage of the legal tender acts, the difference between coin and currency must be recognised and payment enforced, if possible, in the kind of money agreed upon; for the Acts of Congress do not apply to contracts of this nature and they are lawful and capable of enforcement. This principle was enunciated several years ago by the Supreme Court of the United States in *Bronson* v. *Rodes*, 7 Wall. 229, and *Butler* v. *Horwitz*, Id. 258. In the former case, a bond executed in 1851 was conditioned for the payment of a certain sum "*in gold and silver coin*, lawful money of the United States, with interest also in coin;" and it was held that this obligation was not discharged by a tender of the amount and interest in legal tender notes. In *Butler* v. *Horwitz*, a lease made in 1791, reserved the rent "of 15*l.*, current money of Maryland, payable in English golden guineas." The parties having agreed that 15*l.* was worth, at the time of suit brought, $40 in gold and silver, and the parties in possession under the lease having tendered, in payment of this amount, $40 in legal tender notes, it was decided that the lease required payment of rent by the delivery of a certain amount of gold and silver, and that the damages must be assessed at the sum agreed to be due, together with interest, in gold and silver coin of the United States, and judgment was entered accordingly.

Commenting upon the result of the decision in these cases, AGNEW, J., in *Rankin* v. *Demott*, *supra*, says, "The opinions of the chief justice result in this, that after the passage of the legal tender acts there were two descriptions of money in use, coin and notes, both authorized by law and both made a legal tender in payments. As a consequence, there being no express provision to the contrary in the law, it is a just, if not a necessary, inference from the fact that both descriptions of money were issued by the same government, that contracts to pay in either are equally sanctioned by law. It was therefore held that *express* contracts to pay coin dollars can only be satisfied by the payment of coin dollars. See also *Trebilcock* v. *Wilson*, 12 Wall. 687; *Frank* v. *Calhoun*, 59 Penna. St. 381; *Bowen* v. *Darby*, 14 Fla. 202. In a case which arose in the United States District Court, the doctrine above stated was carried so far that it was decided that a contract, entered into since the passage of the legal tender acts, in which payment was to be made in the coin of another country, could only be discharged by payment of so much gold and silver coin of the United States as would equal the amount of foreign coin therein mentioned. Thus, mortgages were given to secure payment of a note for 1000*l.* sterling, and it was held that the intention of the parties was that the sum thereby secured should be solvable only in *gold coin*, and that the recovery, therefore, should be for so many dollars in *gold and silver coin*, as were equivalent to 1000*l.* sterling: *The Surplus, &c., of the Edith*, 5 Benedict 144.

A seeming exception to the rule, that an offer of the kind of money stipulated for in the contract can alone constitute a tender, arises from necessity, where at the time the debt becomes due there is no money of the country of the kind described in the instrument: in such case, the contract ceases to be one for money and becomes a contract for a *commodity*, the value of which is to be ascertained in any current legal tender money of the United States. Just as in all other cases where there is a failure to deliver specific chattels, the damages are assessed in current money, taking as a basis of calculation the actual value of the articles which were to have been delivered. A single case will illustrate this. A ground-rent deed, of the date of 1794, reserved the yearly rent of "thirty-two Spanish milled dollars" and, suit having been brought for one year's rent, the court below gave judgment for the exact number of dollars in the account; which

was reversed by the Supreme Court and a judgment entered for the amount that "thirty-two Spanish milled dollars" would be worth in legal tender money of this country at the date of the judgment. Hence an offer to pay that amount in legal tender notes would be a sufficient tender: *Christ Church Hospital* v. *Fuechsel*, 4 P. F. Smith 73. See also, *Mather* v. *Kinike*, 1 P. F. Smith 426; *Musselman* v. *Watts*, 5 Phila. 51; *Borie* v. *Trott*, 4 Id. 366. But where an instrument provides for the payment of a certain number of dollars "in silver money of the United States, each dollar weighing 17 pwt. 6 gr. at least," it was decided that this was not a contract for a commodity as in the former case, although there are now no dollars of the United States in existence of that description; but that it was a stipulation for the payment of *coined money*, and that the contract having been made subsequent to the Act of Congress of 1849 which declares that a gold dollar should without regard to the weight of the silver dollar be equal to it in value as a legal tender upon all contracts, a tender of the amount in gold coin was sufficient: *Morris* v. *Bancroft*, 1 Weekly Notes (Phila.) 223. And where a written instrument calls for the payment of a definite sum at a future time, to be made in current money of a certain metal, such indebtedness can only be discharged by payment of the sum mentioned in such pieces of money as are, at the time the debt becomes due, a legal tender for the amount. Thus, a ground-rent deed of the year 1806 reserved payment of the yearly sum of one hundred dollars "current silver money of the United States." Suit was brought in the year 1825 for one year's rent, and defendants made affidavit that they had tendered the sum due in current silver coins of the United States of the denomination of one dime each: it was *held*, that this deed created an obligation, not for the delivery of a commodity, but for the payment of *money;* and if payment was to be made in silver pieces, it was requisite that they should be pieces of such current silver money as would, at the time of the tender, lawfully pay the amount of the rent reserved. Hence, dimes not being a legal tender for more than five dollars, the offer to pay one hundred dollars in pieces of that denomination, could not constitute a valid tender: *Maule* v. *Stokes*, 3 Weekly Notes 373.

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